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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JUDITH GUSTAFSON, Plaintiff and Appellant, v. SEQUOIA SURGICAL PAVILION, LLC, et al., Defendants and Respondents.	A153898 (Contra Costa County Super. Ct. No. C1502339)

After the trial court found that her causes of action for breach of contract and financial elder abuse are barred by the statute of limitations, plaintiff Judith Gustafson appeals a summary judgment in favor of defendants Sequoia Surgical Pavilion, LLC (Sequoia or the LLC), NSH Management of California, Inc., and National Surgical Hospitals, Inc. We reverse and remand to the trial court.

FACTS

We take the facts from the stipulated factual and evidentiary record that the parties presented to the trial court.[1]

[1] The parties do not differentiate among the defendants/respondents in their briefs on appeal; neither do we except for occasional clarification in our summary of the facts. As we understand it from the stipulated facts, defendant National Surgical Hospitals, Inc. (NSH, Inc.) is a holding company that owns, operates and manages short stay surgical hospitals and ambulatory surgical facilities, and does business as "National Surgical Healthcare." It develops or acquires surgery centers by creating an LLC funded "by a regional subsidiary and individual investors." NSH Management of California, Inc. (NSH-California) has been the managing member of the LLC since 2000 and owns

Dennis Gustafson was an orthopedic surgeon who practiced in Contra Costa County. Plaintiff is his surviving spouse. In 1999, the Gustafsons purchased two ownership units in an incipient Walnut Creek surgery center to be named Sequoia Surgical Pavilion, LLC. They paid $15,000 per unit. This investment represented a 2 percent ownership interest in Sequoia.

By early 2001, before Sequoia was open for the business of performing surgical procedures, Dr. Gustafson became disabled from Alzheimer's disease and was never able to practice medicine at the facility. Nonetheless, the Gustafsons jointly received periodic distributions as members of the LLC until Dr. Gustafson died on June 27, 2010, by checks made payable to "Dennis H. Gustafson and Judith B. Gustafson." Between 1999 and 2010, Sequoia issued "K-1" forms annually reporting a partner's share of income to the Gustafsons jointly, and Sequoia's IRS Form 1065 Return of Partnership Income filings listed the Gustafsons as the owners of approximately 2 percent of the LLC.

In June 2001 and April 2002, the LLC sent letters to Dr. Gustafson offering to repurchase the units. In February 2004, NSH-California sent a letter to Dr. Gustafson inviting him to contact the LLC if he was interested in selling the units back to the LLC.

In March 2005, the vice president and general counsel of NSH, Inc. sent the Gustafsons a letter confirming that the business records of Sequoia showed that the Gustafsons were owners of two membership units in the LLC.

In June 2005, the LLC sent the Gustafsons a letter addressed to "Physician Partner" informing them that the board of the LLC had amended the Operating Agreement changing the definition of "investor member."

On July 19, 2010 (about a month after Dr. Gustafson died), the LLC informed plaintiff in writing that it had decided to repurchase the Gustafsons' units under the terms of its Operating Agreement, and would do so for $364,204, a value determined by a formula in the Operating Agreement. The July 19, 2010 letter stated that although

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approximately 40 percent of Sequoia's units. NSH-California is a wholly owned subsidiary of NSH, Inc. All defendants are represented by the same counsel.

plaintiff had expressed some interest in retaining ownership of the membership in the LLC, that was not possible under the terms of the Operating Agreement because a member was required to be a physician, and she was not.[2]

Plaintiff and the LLC administrator exchanged emails in which they discussed the LLC's repurchase notification. On August 2, 2010, plaintiff sent a letter to the LLC that she was not in a state of mind to make a decision and needed more time. On August 9, plaintiff sent the LLC administrator an email stating that her counsel had advised her not to discuss the repurchase issue until the documents could be reviewed in detail.

On August 10, 2010, the board of the LLC voted to deem the Gustafsons' units repurchased and to treat plaintiff as a former owner of the units as of July 31, 2010.

On August 27, 2010, the LLC responded to plaintiff's August 2 and August 9, 2010 correspondence, and enclosed a check for $364,204. The accompanying letter acknowledged plaintiff's express "desire to possibly retain ownership" of the interest in the LLC but explained that this was "not possible" under the terms of the Operating Agreement. The letter stated that Sequoia was exercising its rights under the Operating Agreement, specifically section 8.8, to repurchase the units, plaintiff was obligated to sell, the check enclosed was "payment in full" for the repurchase of the membership units, and August 30, 2010 was the closing date for the repurchase. The letter stated that "[a]ll rights and obligations associated with your ownership" of the units "will end on that date."

On September 10, 2010, plaintiff's then-attorney sent the LLC a letter seeking documents and information about the repurchase notification. The LLC responded on September 17. In December 2010, plaintiff returned the $364,204 check to the LLC. The LLC placed the check in escrow.

[2] Even before Dr. Gustafson died, in the fall of 2009 and spring of 2010, plaintiff asked Sequoia's administrator what would happen to the units when her husband died. The administrator referred her to section 8.8 of the Operating Agreement, which she looked at.

More than a year later, on March 8, 2012, the senior vice president and general counsel of NSH, Inc. sent plaintiff a letter referring to a conversation plaintiff had with the Chief Financial Officer of NSH-California and enclosing two copies of a purchase agreement identifying plaintiff as the "seller" of the units and proposing a closing date of March 15, 2012, for the purchase and sale of the units.

On July 20, 2012, the Chief Financial Officer of NSH-California sent plaintiff a letter, referring to their July 18 phone call and the fact that the funds for purchase of the units were still in escrow, and enclosing a revised purchase agreement proposing a closing date of July 31, 2012. This agreement, too, identified plaintiff as the "seller."

The LLC has made periodic (quarterly or monthly) scheduled profit distributions to other unit owners from 2010 through the present, but no profit distributions have been paid to the Gustafsons since July 10, 2010. The last payment by the LLC to plaintiff relating to the two ownership units was the (subsequently returned) $364,204 check the LLC issued for the value of the units.

Plaintiff filed this lawsuit on December 29, 2015.

Defendants moved for summary judgment on the ground that the complaint was time barred, or in the alternative for summary adjudication on the merits of each of plaintiff's individual claims for breach of contract, fraud, financial elder abuse, and breach of fiduciary duty. Plaintiff opposed the motion for summary judgment and filed a motion for summary adjudication of her contract claim on account of the LLC's "recurrent failure" to pay the profit distributions she claimed she was owed as an owner of two units of the LLC.

The trial court granted summary judgment for defendants on the grounds that all of plaintiff's claims were time barred. It did not reach the merits of the individual claims, or plaintiff's cross motion for summary adjudication on her breach of contract claim. Thus, the trial court never determined whether Sequoia acted within its rights under the Operating Agreement in seeking to repurchase plaintiff's shares, or whether it breached its obligation to plaintiff by suspending profit distributions.

Plaintiff appeals that part of the judgment that finds her breach of contract and financial elder abuse claims are time barred. She asks us first to determine whether the trial court erred in finding her breach of contract and financial elder abuse claims time barred, and then if we find error, to reach the merits of her breach of contract claim, an issue the trial court did not reach.

DISCUSSION

I.

Summary judgment is proper "if all of the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc.,[3] § 437c, subd. (c).) The court considers all of the evidence in the papers and the inferences reasonably deducible from the evidence, unless they are contradicted by other inferences or evidence that raise a triable issue of material fact. (§ 437c, subd. (c).) The evidence must be viewed in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

The moving party has the burden of persuasion that there is no triable issue of material fact and that the party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant can meet this burden by showing "that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2).) If defendant meets that burden of production, the burden shifts to plaintiff to show that there is a triable issue of material fact. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.) We review the trial court's grant of summary judgment de novo and determine independently whether the undisputed facts warrant judgment for defendants as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

[3] All undesignated statutory references are to the Code of Civil Procedure.

II.

The statute of limitations for breach of a written contract is four years. (§ 337.)[4] The statute of limitations for financial elder abuse is also four years. (Welf. & Inst. Code, § 15657.7.)[5] The limitations period for the filing of a civil action begins as soon as the cause of action has accrued. (§ 312.) Generally, a "cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." (*Pooshs v. Philip Morris USA, Inc*. (2011) 51 Cal.4th 788, 797.) This is called the " 'last element' accrual rule: ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action.' [Citations.]" (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 (*Aryeh*).)

This lawsuit was not filed until December 29, 2015, more than four years from the August 2010 board resolution to repurchase plaintiff's shares, and the August 27, 2010 letter which enclosed a check for $364,204 in "total payment" and announced that plaintiff's rights and obligations as an owner "will end" on August 30. Absent an exception to the application of the statute of limitations, plaintiff's claims are time barred.

III.

Plaintiff contends the trial court erred in finding her breach of contract and financial elder abuse claims time barred. She seeks refuge in the theory of continuous

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[4] The elements of a claim for breach of contract are "the existence of contract, plaintiff's performance (or excuse for non-performance), defendant's breach, and resulting damages." (*Professional Collections Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690.)

[5] Plaintiff alleges financial abuse of an elder under Welfare and Institutions Code section 15610.30, subdivision (a)(1), which states that "financial abuse" occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with intent to defraud or both." Plaintiff cites Welfare and Institutions Code section 15610.30, subdivision (b), which amplifies that "[a] person or entity shall be deemed to have taken, secreted, appropriated, obtained or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder . . . ."

accrual. Her argument is that under the operating agreement, defendants had a recurring obligation to pay profit distributions to all unit owners, and they breached that obligation every time they made a distribution to other owners of the LLC after July 2010 without including her. Under this theory, each missed payment is a new breach of contract for which plaintiff can recover damages, and she should be permitted to seek profits that were due her within the four-year statutory period dating back from the filing of her complaint on December 29, 2015. Similarly, she contends that the duty not to take an elder's property for wrongful use is ongoing, and it was breached each time Sequoia wrongfully withheld payment of profits from her. Sequoia contends that all of plaintiff's claims arise from the 2010 attempted repurchase, a one-time act completed in 2010, and the continuous accrual theory has no application; the fact that profit distributions were paid periodically makes no difference in the application of the statutes of limitation to these causes of action. The outcome of this appeal turns on whether the continuous accrual theory applies. We conclude the issue is a close one, but plaintiff has the better argument.

Our Supreme Court in *Aryeh* explains that the statute of limitations "exists to promote the diligent assertion of claims, ensure defendants the opportunity to collect evidence while still fresh, and provide repose and protection from dilatory suits once excess time has passed." (*Aryeh*, *supra*, 55 Cal.App.4th at p. 1191.) The legislatively selected "limitations period" is the point where these factors "surmount the otherwise compelling interest" in adjudicating claims on their merits. (*Ibid.*) But as *Aryeh* explains, exceptions to the usual rules applying the statute of limitations defense have been developed to "align [its] actual application of the limitations defense more closely with the policy goals animating it." (*Id.* at p. 1192.) "These doctrines may alter the rules governing either the initial accrual of a claim, the subsequent running of the limitations period, or both." (*Ibid.*) One of these exceptions is the common law "theory of continuous accrual," where "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-

barred as to older events but timely as to those within the applicable limitations period." (*Ibid*.)

The *Aryeh* court discussed the rationale for this theory of accrual. It is "a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated. [¶] To address these concerns, we have long settled that separate, recurring invasions of the same right can each trigger their own statute of limitations." (*Aryeh*, *supra*, 55 Cal.4th at p. 1198.) *Aryeh* cited as examples *Dryden v. Board of Pension Commrs.* (1936) 6 Cal.2d 575, which permitted a widow to sue to enforce her pension rights ("the expired limitations period did not leave the plaintiff 'without means to enforce the right to present and future pension payments, as distinguished from past and accrued pension payments' "), and *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 (*Howard Jarvis*), which permitted a lawsuit challenging the continuing monthly collection of the tax as an alleged ongoing breach of law, although it was too late to challenge the validity of the original ordinance imposing the tax. (*Aryeh*, *supra*, 55 Cal.4th at pp. 1198-1199.)

"Generally speaking, continuous accrual apples whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' (*Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1295.) Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation (*Pooshs v. Philip Morris USA, Inc*., *supra*, 51 Cal.4th at p. 797)—each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh*, *supra*, 55 Cal.4th at p. 1199.)

If the theory of continuous approval applies, it "supports recovery only for damages arising from those breaches falling within the limitations period." (*Aryeh*, *supra*, 55 Cal.4th at p. 1199.)

In *Aryeh*, defendant Canon Business Solutions, Inc. (Canon) leased copiers and provided service to plaintiff copy business and billed it on a monthly basis. Plaintiff alleged that Canon fraudulently and unfairly overcharged it by making excess copies every month, resulting in nearly three years of monthly bills with excess copy charges and late fees. When Aryeh sought restitution under the Unfair Competition Law (UCL), Canon demurred on statute of limitations grounds. The Supreme Court wrote that "[t]o determine whether the continuous accrual doctrine applies here, we look not to the claim's label . . . but to the nature of the obligation allegedly breached. . . . Canon billed Aryeh on a recurring monthly basis. . . . By its nature, the duty Canon owed—the duty not to impose unfair charges in monthly bills—was a continuing one, susceptible to recurring breaches. Accordingly, each alleged breach must be treated as triggering a new statute of limitations." (*Aryeh*, *supra*, 55 Cal.4th at p. 1200.) Although Aryeh could not recover alleged excess charges preceding the four-year limitations period, it could seek recovery for charges alleged to be within the four years preceding the suit, and the complaint was not completely time barred. (*Id*. at pp. 1200-1201.)

Plaintiff relies heavily on *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas* Co. (2004) 116 Cal.App.4th 1375, 1388-1391 (*Armstrong*). There, a plaintiff sued defendant oil and gas drilling operator for breach of contract under an oil and gas operating agreement that required defendant to make monthly payments or deliveries. Plaintiff contended that defendant had miscalculated plaintiff's interests every month, and plaintiff sought damages for underpayment. (*Id*. at p. 1387.) Defendant asserted that the breach of contract claim was barred because it had not been brought within four years of the initial breach. Plaintiff contended that the contractual right to monthly payments was a series of severable contractual obligations, and there was a new distinct wrong with its own accrual date every time underpayment or under delivery occurred within four years from the date the lawsuit was filed. The Court of Appeal agreed with plaintiff, relying on

a theory of continuous accrual. As applied to contractual disputes, it held, "the rule is but an application of the doctrine of contractual severability." (*Id*. at p. 1388.) In concluding that the contract was severable, the *Armstrong* court examined the language of the contract to determine the nature of the payments due and the conduct of the parties. "In summary, Tri-Valley's incorrect interpretation of the formula for calculating Armstrong's net revenue interest was the wrong that continued over time. However, that 'wrong' is not one of the four elements of a cause of action for breach of contract. It simply explains why the breach of contract—the payment of the wrong amount of money to Armstrong or delivery of the wrong amount of production—was repeated each month. Because the act of paying or delivering the wrong amount constituted the breach of contract and caused damage in the amount of the underpayment or underdelivery, we conclude that all of the elements of a cause of action relating to a breach of that monthly obligation did not occur, and thus a cause of action did not accrue, until Tri-Valley made the incorrect payment or delivery for that month." (*Id*. at p. 1391, fn. omitted.)

Here, plaintiff contends that, as in *Armstrong*, the operating agreement imposes a recurring obligation on Sequoia to pay profit distributions to all unit owners in proportion to the ownership interests held by the unit owners, an obligation Sequoia carried out for more than a decade, in a separately calculated payment of varying amounts depending upon the ownership interests and the profits and losses of the business. The unit owners are individual investors and corporate entities who gave money to Sequoia in exchange for an ownership stake. The Operating Agreement is "intended to operate an ongoing business concern"; many duties are imposed on the LLC and its manager, and nothing suggests that the breach of one duty constitutes a breach of the entire agreement. Instead, the LLC's duty to allocate profits and losses "gives rise to discrete periodic transactions that can all be distinguished and divided from each other. . . . [E]ach of Sequoia's profit distributions since it stopped including Ms. Gustafson is a traceable transaction with a specific dollar value, that is reflected in Sequoia's financial record. There is no dispute that Sequoia has a legal duty to correctly distribute profits in compliance with the operating agreement's terms each and every time it makes a distribution. If Sequoia

breached those terms in August 2010 that breach clearly would not excuse future performance in, for example, December 2015, and the Defendants have not contended otherwise. This is the very essence of a severable contractual obligation." Plaintiff argues that here, as in *Armstrong*, the "continuing nature" of Sequoia's business lends itself to separating the distribution of profits in one period from later periods. (*Armstrong*, *supra*, 116 Cal.App.4th at p. 1390.)

Sequoia argues that plaintiff's claims are time barred because she knew that in 2010 it repurchased her units and "disavowed" further obligations to her. Sequoia contends plaintiff's continuous accrual theory is simply an "attempted end-run" around the statute of limitations, because plaintiff's injuries in essence arise out of a single act.

But in support of this point Sequoia relies on cases that are distinguishable, including *Dillon v. Board of Pension Commrs.* (1941) 18 Cal.2d 427, 430-331 (*Dillon*). In that case, a widow's claim for a pension after her husband, a Los Angeles police officer, committed suicide, was time barred because, although she made an (unsuccessful) application to the Board of Pension Commissioners under the city charter within the then-required six month window after her husband's death, she did not seek mandamus in the superior court to review the Board's decision and establish her right to a pension for more than three years. The Supreme Court determined that petitioner's claim accrued on the date of her husband's death, and having failed to establish her right to a pension in a timely way, she could not in her subsequent petition compel the payment of periodic unpaid payments. But *Dillon*, as the Supreme Court made clear subsequently in *Howard Jarvis, supra,* 25 Cal.4th 809 is limited to its facts. In *Howard Jarvis,* taxpayer advocacy groups and individual tax payers sought declaratory judgment and a writ of mandate that a local city tax was invalid because it was passed without voter approval. The city argued the action was untimely because it was filed more than three years after the ordinance was enacted. The Supreme Court concluded that the lawsuit could proceed because if the tax was illegal, the continued imposition and collection of the tax is an ongoing violation, and the limitations period begins each time the tax is collected. (*Id*. at p. 812.) In arguing the lawsuit was time barred, the city cited *Dillon*, which the Supreme

Court then limited to its facts: "Our holding [in *Dillon*] depended, however, on the premise that the plaintiff could not establish the right to a pension in an action to compel payment of a particular installment." (*Id.* at p. 822.) And "[u]nlike in *Dillon* . . . plaintiffs' failure to establish the tax's invalidity within three years of its enactment does not preclude them from complaining, on grounds of such invalidity of the tax's continuing collection." (*Ibid*.)

Armstrong, supra, on which plaintiff relies, also recognized the limited reach of *Dillon*. There, too, defendant argued that the lawsuit was time barred because it was an action to determine plaintiff's right to receive a particular net revenue interest under the operating agreement, and such an "action to determine the existence of such a right necessarily precedes and is distinct from an action to recover any shortfall in the monthly payments which have fallen due." (*Armstrong, supra*, 116 Cal.App.4th at p. 1392.) Citing *Howard Jarvis,* the *Armstrong* court also found that *Dillon* was "distinguishable from the present case because Armstrong's contractual rights were not conditioned upon completing a claims procedure. Instead, Armstrong's right to receive a net revenue interest was established by the [operating agreement]." (*Id*. at p. 1392.)[6]

[6] Even more recently, the court in *Gilkyson v. Disney Enterprises, Inc*. (2016) 244 Cal.App.4th 1336, rejected a defendant's reliance on *Dillon* in support of its contention that a party must always "first establish a continuing right before it may utilize the continuous accrual doctrine," and went on to hold that the doctrine of continuous accrual applied. (*Id*. at p. 1344.) In *Gilkyson*, a songwriter's heirs sued defendant Disney for breach of contract for alleged failure to pay royalties for the sale of home videos of movies with the songwriter's songs. Disney had been paying royalties under the agreement for other categories of sales, but not for DVD's. Disney argued the DVD claims were time barred; the heirs contended the claims within the last four years of filing the complaint were subject to the continuous accrual doctrine and not barred. Analogizing the facts to the royalty agreement in *Armstrong, supra,* the *Gilkyson* court wrote, "[s]imilarly here, the Gilkyson heirs' contract cause of action asserts the breach of an established contractual right to royalties, albeit one grounded in contract language that may ultimately require extrinsic evidence to determine its scope, not an expectation or inchoate right subject to confirmation in an uncompleted claims process." (*Id*. at p. 1345.)

Sequoia also relies on *State ex rel. Metz v. CCC Information Services, Inc*. (2007) 149 Cal.App.4th 402 (*Metz*), a case that does not assist the analysis. Plaintiff Metz was in a car accident, his car was totaled, and he made a claim under an insurance policy issued by Farmers that resulted in a settlement. Plaintiff then brought this qui tam action against defendant CCC Information Services for making false or misleading statements in violation of Insurance Code section 1871.7, subdivision (b) in connection with the settlement of Metz's claim. The statements at issue were the "comparable automobile" valuations that CCC gave Farmers in connection with the settlement of Metz's claim, which he alleged were made with "arbitrary and illegal criteria" and with a concealed methodology, and all designed to induce him to settle below the full value to which he was entitled. (*Id.* at p. 406, 409.) The demurrer was sustained without leave to amend on alternative grounds, including that the action was barred by the statute of limitations.[7] The Court of Appeal affirmed the judgment. First, it concluded that the claim was time barred under the three-year statute of limitations in Insurance Code section 1871.7, Metz having been on inquiry notice more than three years before he filed his complaint. (*Id*. at pp. 417-418.) And then it made short shrift of Metz's argument that the continuing accrual doctrine saved his claim, finding that Metz's claim did not involve a "recurring obligation or any such periodic payment obligations. Rather, *every* fraudulent statement or admission Metz alleges arose out of a single transaction—his insurance claim for the 1999 total loss of the Galant—which was resolved before the limitations period ran." (*Id.* at p. 418.) We need say no more.

Sequoia also relies heavily on *Vaca v. Wachovia Mortgage Corp*. (2011) 198 Cal.App.4th 737 (*Vaca*). But that case does not even address the issue of continuous accrual. In *Vaca,* plaintiff's estranged husband had created false credit histories for their children, and used the identities to engage in fraudulent transactions on two real

[7] An additional ground was that the lawsuit violated the proscription in section 1871.7 "against the filing of related actions by any person other than the district attorney or Insurance Commissioner." (*Metz, supra,* 149 Cal.App.4th at p. 407.)

properties. After plaintiff discovered the fraudulent transactions in 2004, she filed a fraud action against her estranged husband and mother-in-law and obtained judgment in connection with the fraudulent transactions. (*Id.* at pp. 740-741.) In 2009, the plaintiff (on behalf of her minor children) sued defendant lenders. The Court of Appeal held that the 2009 lawsuit against the lenders was time barred because plaintiff failed to allege that the defendant lenders "did anything wrong after making the fraudulent mortgage loans in 2000 and 2001." (*Id*. at pp. 744-745.) Plaintiff argued unsuccessfully that the limitations period did not run because the defendant lenders had engaged in "continuing wrongs." The Court of Appeal rejected this argument both because plaintiff made no allegations sufficient to invoke this theory, nor sufficient legal authority. Noting that plaintiff cited but one authority in support of her theory (*Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444), the court in *Vaca* wrote that *Pugliese* "held domestic violence is a continuing tort for statute of limitations purposes. It relied upon the unique nature of domestic violence and a statute providing that 'domestic violence lawsuits must be commenced within three years "from the date of the last act of domestic violence." ' " (*Vaca* at p. 744.)

As far as the *Vaca* court was concerned, defendants' acts were "completed" after making the fraudulent mortgage loans in 2000 and 2001, and the fact that plaintiff asserted that she allegedly suffered injury in 2007 and 2010 when the properties at issue were sold was beside the point for purposes of statute of limitations. (*Vaca, supra,* 198 Cal.App.4th at p. 745.) But the court in *Vaca* did not address whether the "continuing accrual" doctrine was or was not in play. It simply made the unremarkable statements that if "continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning" and that the "time bar starts running when the plaintiff first learns of actionable injury . . . even if the injury will linger or compound." (*Id*. at p. 745.) All true, but not mutually exclusive with the application of the doctrine of continuous accrual, as described by our Supreme Court in *Aryeh*, in the appropriate case.

Here, plaintiff did allege that Sequoia engaged in a series of continuing wrongs, not just one. The continuing accrual theory does not do away with the statute of

limitations for breaches outside the statutory period or make it meaningless; it simply recognizes a new statutory period is triggered by the recurring breach.

Sequoia also cites federal cases, none of which is instructive. In *DC Comics v. Pacific Pictures* Corp. (C.D. Cal. 2013) 938 F.Supp.2d 941 (*DC Comics*), a comic books publisher (DC Comics) sued the heirs to Joe Shuster, an illustrator who co-created the character that became Superman, and others for tortious interference in connection with the heirs' attempted statutory termination of DC Comics's interest in certain copyrights. DC Comics argued unsuccessfully on various grounds (including the doctrine of continuing accrual) that its claim was not time barred, although it is not clear at all from the opinion how continuing accrual even arguably applied, and the facts are not at all similar to this case. (*Id.* at p. 951.)

In *Garrison v. Oracle Corp*. (N.D. Cal. 2016) 159 F.Supp.3d 1044, 1083 (*Garrison*), another case cited by Sequoia, plaintiffs, all former employees of Oracle, brought a putative class action alleging that Oracle conspired with other companies to violate federal and state antitrust laws by fixing and suppressing employee compensation. Acknowledging that California courts have recognized a theory of continuous accrual and citing *Aryeh* and many of the authorities discussed above, the trial court dismissed plaintiffs' argument that the theory applied in that case. Plaintiffs contended that Oracle had a "continuing obligation not to collude with competitors to restrict free competition for engineers and managers that was susceptible to being breached each time a Secret Agreement[8] was entered into or renewed or reaffirmed." (*Id*. at p. 1083.) The trial court found first that the second amended complaint failed to allege this continuing duty, and in addition, a duty " 'not to collude with competitors' . . . bears little relation to the monthly payments or monthly bills that California courts have found to be periodic recurring obligations warranting continuous accrual." (*Ibid*.) Moreover, even if Oracle had

[8] These "Secret Agreements" pertained to alleged agreements between companies to restrict hiring in various ways and not to solicit each other's consultants. (*Garrison, supra,* 159 F Supp.3d at pp. 1053-1054.)

breached a continuing duty (assuming there was one), there was no allegation that any of these actions occurred during the limitations period. (*Ibid*.) This case lends no support to Sequoia's claim.

Finally, Sequoia cites *Hameed v. IHOP Franchising LLC* (9th Cir. 2013) 520 Fed.Appx. 520, 522, a brief memorandum opinion affirming a dismissal of a franchisee's claims for failure to prosecute under Federal Rule of Civil Procedure 41(b). Sequoia's three-line explanatory parenthetical is not elucidating, and the memorandum opinion does little more than to state the conclusion that the theory of continuous accrual as described in *Aryeh* is inapplicable to Hameed's UCL claim related to an "Equipment Lease."

IV.

Sequoia argues that if a breach of contract did occur, which it disputes, it only occurred once in July 2010 and the "mere fact that the Operating Agreement contemplated periodic payments" did not make its provisions severable.[9] Sequoia argues that it "repurchased [plaintiff's] husband's interest in 2010" and it had no continuing obligations after that. To which plaintiff responds, it's not that simple: Sequoia made many efforts before Dr. Gustafson died in 2010 to convince them to sell their units, all of which were declined. And after he died, Sequoia still sought her agreement. When she refused to sign the contract, Sequoia took board action and claimed no agreement was required. After plaintiff returned the purported repurchase check, Sequoia still continued

[9] Sequoia does not disagree with plaintiff's position that Sequoia never "repudiated" the contract or terminated her membership interest. Nonetheless, it claims that its communications that it was repurchasing plaintiff's units "notified [plaintiff] of her status." But this case is not about notice, or the discovery rule.

In holding for Sequoia, the trial court relied heavily on *Fox v. Dehn* (1974), 42 Cal.App.3d 165, a breach of an oral employment case brought against a decedent's estate by two real estate salesmen that the court held was barred by the three-month statute of limitations. *Fox* does not mention the doctrine of continuous accrual, although it refers to (and discounts) appellants' argument that the agreement with decedent was "severable." (*Id*. at p. 172.) But the trial court thought it was "analogous" because there, as here, defendant had terminated plaintiff and repudiated plaintiff's rights. Except to acknowledge briefly that the trial court relied on this case, Sequoia does not discuss *Fox*.

to attempt to acquire her consent to the sale by sending her contractual purchase agreements years after the transaction had purportedly closed. In these agreements that post-dated August 30, 2010—the supposed date by which the board resolution repurchased the units—Sequoia identified her as the seller and the owner of the units.

Under these circumstances, in plaintiff's view, there was no "repurchase" of her shares. Instead it was "a series of failed offers to purchase the shares accompanied by a decision to stop including Ms. Gustafson in profit distributions."

For statute of limitations purposes, we agree. Within the four-year statutory period going back from when the complaint was filed in December 2015, she is entitled to pursue her claim of breach of contract and financial elder abuse.

V.

Plaintiff also asks us to address her motion for summary adjudication as to Sequoia's liability for breach of contract, an issue that the trial court did not reach because of its ruling on the bar of the statute of limitations. Plaintiff contends undisputed material facts show she is entitled to a finding that Sequoia breached its duty to pay her periodic profit distributions, and we should determine the merits of plaintiff's motion for summary adjudication on her claim for breach of contract in the first instance. We decline to do so. In our view, it is appropriate to remand for the trial court to address the issue and comply with the statutory requirement that it specify the reasons for granting or denying the motion, in an order that refers to the evidence proffered in support of and, if applicable, in opposition to the motion. (§ 437c, subd. (g); see also *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 100-101.) In that regard, although the parties have submitted a set of stipulated facts, in connection with its motion for summary judgment plaintiff submitted an additional separate statement of undisputed material facts to which Sequoia responded that some of the facts are disputed.

DISPOSITION

The judgment is reversed insofar as it barred plaintiff's claims for breach of contract and financial elder abuse on the grounds of statute of limitations. The matter is remanded for proceedings consistent with this opinion. Costs are awarded to plaintiff.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

A153898, *Gustafson v. Sequoia Surgical Pavilion, LLC, et al.*